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Supreme Court of the United States

October Term, 1936.

No. 217.

MIDLAND REALTY COMPANY, *Appellant,*

vs.

KANSAS CITY POWER & LIGHT COMPANY, *Appellee.*

Appeal from the Supreme Court of the State of Missouri.

BRIEF OF APPELLEE.

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Supreme Court of the United States

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No. 217.

MIDLAND REALTY COMPANY, *Appellant,*

vs.

KANSAS CITY POWER & LIGHT COMPANY, *Appellee.*

Appeal from the Supreme Court of the State of Missouri.

BRIEF OF APPELLEE.

I.

OPINION OF THE COURT BELOW.

The opinion in the case of Kansas City Power & Light Company vs. Midland Realty Company handed down by the Supreme Court of Missouri, Division No. 1, on January 11, 1936, is not as yet officially reported in the Missouri Reports, but the said opinion is reported in full in 93 Southwestern, 2d Series, page 955.

II.

STATEMENT.

The statement of the plaintiff below (appellee here), which was conceded to be correct by the defendant (appellant here), was adopted with only slight change by the Supreme Court of Missouri. The appellant does not follow that statement in his brief here, erroneously states certain facts and raises issues therein not raised in the court below. In fairness to this Court and the appellee, the appellee submits as its statement the statement of the case by the Supreme Court of Missouri in its opinion, 93 S. W. (2d), l. c. 955, 956:

"On February 27, 1908, the defendant entered into a contract with the plaintiff, whereby plaintiff agreed to furnish steam heating service to defendant for several of defendant's buildings located in Kansas City, according to a certain schedule of rates set forth therein. This contract was for a period of five years beginning September 1, 1908, and ending August 31, 1913, with an option to defendant to extend the same for an additional five-year period by giving written notice. The option was exercised May 29, 1913. Before the contract had thus been extended the Public Service Commission Law of the state was enacted on March 17, 1913, and became immediately effective. Laws 1913, pp. 556-651, inclusive, R. S. 1929, C. 33, Mo. St. Ann. § 5121 *et seq.*, p. 6531, *et seq.*

"On June 28, 1917, the plaintiff filed a schedule of rates, effective August 1, 1917, for all of its steam heat customers. Under this schedule the rates provided were higher than those provided in defendant's said contract.

"Early in September, 1917, Kansas City and numerous users of plaintiff's steam heat service (not including this defendant) filed with the Commission complaint against said schedule. After hearings had thereon, the Commission, on February 11, 1918, found said rates to be 'unjust and unreasonable and said rates and prices unreasonably high.' Case No. 1353, 5 P. S. C. Mo. 664. Thereupon, the Commission, by order, fixed and established as just and reasonable a lower schedule of rates and made same effective March 1, 1918. Plaintiff filed a new schedule accordingly. This rate also was higher than defendant's contract rate. It is to be noted that in its case No. 1353 the Commission made no attempt to separate or to allocate values and operating expenses as between heating and electrical services, and was unwilling to do so 'without further investigation.'

"On June 11, 1918, plaintiff entered complaint before the Commission charging that its rates for electric service and for steam heat were inadequate and confiscatory. This complaint was docketed and heard as case No. 1615. 8 P. S. C. Mo. 223. In this latter proceeding the Commission made the allocation which had been omitted in the other case, predicating the same upon its finding that the rates put into effect March 1, 1918, were 'inadequate, unjust and unreasonably low, and that during none of the time was heating revenue sufficient, even to meet the fuel expenses alone.' And the Commission established new rates which displaced the next previous schedule of March 1, 1918. This new schedule did not become effective until December, 1919, as to steam heat, and was even higher than either of the next two preceding schedules. The Commission further found that 'heretofore the steam heat business has been carried at a loss, and this loss has been borne either by the light and power con-

sumers or by the company. This is a distinctly inequitable condition which must be eliminated as soon as practicable.' The findings and order of the Commission established in said case No. 1615 were approved by this Court in *State ex rel. Mary B. Case et al.* v. *Public Service Comm. et al.*, 298 Mo. 303, 249 S. W. 955.

"After August 1, 1917, plaintiff billed defendant for its steam heating service under the schedule effective on that date until March, 1918, and thereafter under the schedule of the latter date until August 31, 1918, which was the date defendant claimed its contract expired; but defendant refused to pay as billed and made payments still in accordance with the rate in its contract, claiming said rates still to be effective, and such payments were credited on account by the plaintiff; the latter claiming the filed schedule rate was the legal and only rate that could be lawfully charged, and that the defendant's rate contract was void.

"This case is for the recovery by the plaintiff from the defendant of the difference between the rates claimed to have been effective and the contract rates for the period August 31, 1917, to March 1, 1918 (pleaded in the first five counts of the petition), and the difference between the rates effective March 1, 1918, and the contract rates for the period from that date to and including August 31, 1918 (pleaded in the last six counts). The court *nisi*, on a trial without a jury, found against the plaintiff on the first five counts of the petition, and found for the plaintiff on the remaining six counts. Both parties appealed.

"The foregoing statement with only slight change is the same as the statement contained in plaintiff's brief and conceded by defendant to be correct. The matters, orders, and records referred to in the statement were

all introduced in evidence on the trial. Apart from that there was no further evidence save the case of *Marty et al.* v. *Kansas City Light & Power Co.*, 303 Mo. 233, 259 S. W. 793, which was introduced. There is no dispute between the parties relative to the amount of the overplus of the schedule rates above defendant's contract rate. This case is before this Court because of the constitutional questions of alleged impairment of obligations of contract and denial of due process raised as issues of law herein upon the undisputed facts." (R. 4-15.)

III.

SUMMARY OF THE ARGUMENT.

1. There is no substantial Federal question before this Court because:

(a) The Supreme Court of Missouri has consistently held that the enactment of the Public Service Commission Law of Missouri and the establishment of rates for public service thereunder by the Public Service Commission is the exercise of the police power of the State which cannot be abridged by private contract in view of Section 5, Article 12, of the Constitution of Missouri, providing "The exercise of the police power of the State shall never be abridged," and that contract rates held for naught and unenforceable by such exercise of the police power is not the impairment of the obligation of contracts protected by the Federal Constitution, nor property rights entitled to the protection of the due process clause of the Federal Constitution. These holdings have been repeatedly approved by this Court.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra,* at pages 10-18.)

(b) The Supreme Court of Missouri has consistently held that a schedule of rates and charges for utility service filed with the Public Service Commission and published in accordance with paragraph 12, Section 5190, Revised Statutes of Missouri 1929 (originally enacted as Sec. 69, Public Service Commission Act, L. of M. 1913, p. 557, l. c. 603), and made applicable to heating utilities by Section 5228, Revised Statutes of Missouri 1929

(originally enacted as Sec. 105a, Public Service Commission Act, L. of M. 1913, page 557, l. c. 637), acquire the force and effect of law, become the only rates and charges that can be lawfully charged for such service until a new or supplementary schedule is filed voluntarily by the utility or by order of the Commission, and are binding on the utility, the public and the Commission, and this Court has consistently put a similar construction upon analogous provisions of the Interstate Commerce Act.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra,* at pages 18-23.)

(c) The construction by the highest court of a State upon its Constitution and laws are controlling upon this Court.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra,* at pages 23, 24.)

2. The enactment of the Public Service Commission Law and the filing of the schedule of rates thereunder effective August 1, 1917, superseded all private contract rates for steam heat then in effect. The filed rate effective August 1, 1917, having been on file with the Public Service Commission for more than thirty days prior to its effective date and not suspended by the Commission, became the lawful rate for steam heating service and was the only lawful rate that could be charged the consumers while it was in effect. Said rates effective August 1, 1917, were just and reasonable charges for steam heating service; they were presumed just and reasonable from their filing until their unreasonable

character should be made to appear; and the doubt cast upon their justness and reasonableness by the findings of the Public Service Commission in case No. 1353 was overcome and destroyed by the subsequent findings and ruling of the Commission in case No. 1615.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra*, at pages 24-32.)

3. When the Public Service Commission of Missouri, after a hearing, promulgated a new schedule of rates effective March 1, 1918, and ordered the appellee to charge said rates for its steam heating service in the future, it effectively substituted the new rates for the ones contained in appellant's contract, even though appellant was not a party to the proceeding. In fixing rates, a public utility commission cannot be clogged or obstructed in its operation by contract rates, and a utility in Missouri may not charge one customer one rate and another a different one.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra*, at pages 32-37.)

4. The Supreme Court of Missouri has correctly construed Section 5208 as not exempting existing contracts from the scope of the exercise of the police power of the State to protect and promote the public welfare by regulating rates of public utilities so as to raise or lower, as the case may be, previously existing contract rates. Since the meaning attributed by the highest court of a State to a statute of the State must be accepted by the United States Supreme Court, on review, as though it had been specially expressed in the statute, this Court will not

determine whether the State Court's construction was right or wrong.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra*, at pages 37-41.)

IV.

ARGUMENT.

1.

The three propositions presented in our Summary of Argument under this point (pages 6, 7, *supra*) will now be discussed in order:

(a) The Supreme Court of Missouri has consistently held that under the Missouri Constitution, Sec. 5, Art. 12, providing "The exercise of the police power of the State shall never be abridged * * *," private contracts for utility rates are for naught and unenforceable when the State exercises the police power so reserved in it by the enactment of the Public Service Commission Act (Laws Missouri 1913, pp. 556-651, inc.; R. S. Mo. 1929, Chap. 33) effective March 17, 1913, and the Public Service Commission establishes rates thereunder. This is on the theory that all private contracts are made subject to the reserved power of the State and when the State exercises this reserved power such contracts being made subject to said reserved power are for naught and unenforceable. In other words, these contracts being made subject to this reserved power are not private contract rights that are entitled to the protection of the Federal constitutional provision prohibiting the abrogation of contracts, and are not property rights, because they are not contract rights that would be subject to due process guaranteed by the due process clause of the Federal Constitution.

Sec. 5, Article 12, of the Constitution of Missouri was adopted as part of the Constitution of Missouri when that instrument was adopted in 1875 (R. S. Mo. 1929,

p. 59). Appellant's contract was entered into February 28, 1908 (R. 47); the Public Service Commission Act of Missouri containing an emergency clause was approved March 17, 1913, and effective April 15, 1913 (Laws of Missouri 1913, p. 651); appellant elected to renew its contract May 29, 1913 (R. 4); the first rate in controversy herein having been filed and published for more than 30 days was effective August 1, 1917 (R. 44); and the second rate in controversy herein was effective March 1, 1918, by order of the Public Service Commission (R. 44). Hence, appellant's contract having been made long after the Missouri constitutional provision was adopted was subject to it, and when the police power of the State was exercised by the enactment of the Public Service Commission Act and rates established thereunder the contract rates of appellant were for naught and unenforceable. The situation might be entirely different if appellant had an existing contract and subsequent to the date thereof a State constitutional provision or statute improperly abrogating said contract was adopted, but such clearly is not the case here. In this case appellant had no contract rights to be abrogated, and having no contract rights, it had no property rights to be protected.

One of the first cases where the above doctrine was announced by the Supreme Court of Missouri was that of *State ex rel. City of Sedalia* v. *Public Service Commission,* 275 Mo. 201, where water rates established by an ordinance of the City of Sedalia were increased by the establishment of rates by the Public Service Commission. In that case the same questions of impairment of obligations of contract and due process was raised as in this case. In that case the Supreme Court, Division No. I, concluded (275 Mo. 201, 212):

"We have preferred to rest the ruling in this case upon what this court has previously ruled, *which rulings have been in the light of our own peculiar constitutional provision.* Under it the sovereign police power of the State is preserved intact, irrespective of contracts with reference to rates for public service. Under it no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates, whether such reasonable rates be lower or higher than the contract rate. Under the Constitution and the Public Service Commission Act the Public Service Commission (supervised by the courts as to the reasonableness of rates) is exercising the police power of the State by its delegated authority from the Legislature. Its rates therefore constitutionally and legally supersede any and all contract rates. Other theories of case law need not be noted." (Italics ours.)

This Court approved the ruling of the Supreme Court of Missouri in that case by dismissing the writ of error of the City of Sedalia for want of jurisdiction upon the authority of *Pawhuska* v. *Pawhuska Oil & Gas Company,* 250 U. S. 394, and *Chicago* v. *Dempcy,* 250 U. S. 651.

State ex rel. City of Sedalia v. *Public Service Commission,* 251 U. S. 547.

In *City of Fulton* v. *Public Service Commission,* 275 Mo. 67, higher telephone rates fixed by the Public Service Commission were protested by the City of Fulton on behalf of its citizen subscribers because of rates fixed by a franchise ordinance. The Supreme Court of Missouri, *In Banc,* followed expressly the ruling in the City of Sedalia case, *supra,* and pertinently said (275 Mo. 67, 71); "All such contracts necessarily are made in contem-

plation of the State's power to fix rates. This disposes of the idea that the revision of rates impairs the obligation of contracts." In that case the court distinguished a contrary ruling in *Sloan* v. *Railroad,* 61 Mo. 24, because "The Sloan case was based upon legislation enacted prior to the adoption of the Constitution of 1875" (275 Mo. 67, 71). As we have stated heretofore, if appellant's contract had antedated the adoption of the Constitution of 1875 containing Sec. 5 of Art. 12, appellant might have a case. But such is not so in this case.

This Court approved the City of Fulton case by dismissing the city's writ of error for want of jurisdiction upon the authority of the same cases cited in dismissing the City of Sedalia case.

State ex rel. City of Fulton v. *Public Service Commission,* 251 U. S. 546.

In *Kansas City Bolt & Nut Company* v. *Kansas City Light & Power Company,* 275 Mo. 529, injunction was sought to prevent higher rates of electricity fixed by the Public Service Commission from being collected because of a private contract rate made prior to the Public Service Commission Act. The plaintiff, Bolt & Nut Company, stood by its contract as appellant in this case, and plaintiff lost in the trial court and in the Supreme Court of Missouri, *In Banc.* The Supreme Court of Missouri therein held, in following the City of Sedalia and City of Fulton cases, *supra,* that there was no valid reason why a rate contract entered into between a private manufacturing corporation and a public service corporation would not be just as much of an abridgment of the rate-making power of the State as would a rate contract between a municipality and such public service corporation, if permitted to stand.

This Court approved the ruling of the Supreme Court of Missouri in the Bolt & Nut Company case by affirming the same upon the authority of *Union Dry Goods Company* v. *Georgia Public Service Corporation,* 248 U. S. 372.

Kansas City Bolt & Nut Company v. *Kansas City Light & Power Company,* 252 U. S. 571.

In *State ex rel. Washington University* v. *Public Service Commission,* 308 Mo. 328, eighteen steam heating consumers of the Union Electric Light & Power Company who had leased their own private heating plants to that utility and as a part of the lease contracts set up contract rates for steam heating service between themselves and that utility, protested the fixing of higher steam heating rates by the Public Service Commission. Other consumers likewise situated did not protest the increased rates. That was a case involving private steam heating rate contracts as this, with the same questions involved. The Supreme Court of Missouri, *In Banc,* held such contracts were not private contract rights, and when so viewed, there were no substance to those sundry contracts. We beg the forbearance of this Court in making a rather long quotation from that case, as the Supreme Court of Missouri sets out the matter so much more clearly than we could possibly do, and also, by making this quotation, a separate treatment of the case of *Chicago & Alton Railroad Company* v. *Tranbarger,* 238 U. S. 67, wherein this Court specifically construes Sec. 5 of Art. 12 of the Missouri Constitution, will not be necessary. The Supreme Court of Missouri said in that case (308 Mo. 328, 342, 345, 346):

> *"These contracts are of no vitality, in so far as they affect rates. The Public Service Commission,*

in fixing rates, cannot be clogged or obstructed by contract rates. This question was early threshed out by this court in several cases, some of which went to the Federal Supreme Court, in each of which this court was sustained. The original case, the ruling in which has never been changed, is *State ex rel. City of Sedalia* v. *Public Service Commission,* 275 Mo. 201. *The effect of this and subsequent holdings, is that contract prices count for naught in the fixing of rates by the Public Service Commission.*" (Italics ours.)

* * * * * * * * *

"IV. Learned counsel for respondent have in view the force and effect of a contract under the views expressed in the Old Dartmouth College case. They overlooked the changes in the law made by constitutional provisions since that date. We have always been a strict constructionist, but in *State ex rel. City of Sedalia* v. *Public Service Commission,* 275 Mo. 210, we had occasion to review the law as it is now. Under our Constitution the police power of the State is held inviolable. [Sec. 5, Art. XII, Mo. Const.] In *State ex rel.* v. *Public Service Commission,* 275 Mo., l. c. 209, we said:

"'Note the language, "the exercise of the police powers of the State shall never be abridged." Under such a constitutional restriction the Legislature would be powerless to enact a valid law by the terms of which the right of the State in the exercise of its sovereign police power in the fixing of reasonable rates for public services could be limited or abridged. This court so held in *Tranbarger* v. *Railroad,* 250 Mo., l. c. 55, whereat BOND, J., said:

"'"(2) All powers of government which regulate the public health, welfare and the property rights of its people—these, no State can strip herself of, for that would render it incapable of carrying out the prime purpose of its creation. The sanctity and import of this attribute of sovereignty are recognized in the Constitution of this State, to-wit: 'The exer-

cise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State.' [Art. 12, Sec. 5, Constitution of Missouri.] The only restrictions upon the exercise of this faculty are that its use shall be reasonably adapted to the ends for which it is given, and that it shall not infringe any right or privilege guaranteed by the Federal Constitution. The authorities and cases demonstrating these principles are uniform.'

" 'Some of us thought the pronouncement a little broad and dissented, but the case was taken to the United States Supreme Court and there affirmed. [*Chicago & Alton Railroad Co.* v. *Tranbarger,* 238 U. S. 67.]

" 'The United States Supreme Court was even more explicit in this Tranbarger case than was the majority opinion in this Court. To its rule we must bow. At page 76 of this Tranbarger case, 238 U. S. 67, it is said:

" ' "It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the powers of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of this community; that this power can neither be abdicated or bargained away, and is inalienable even by express grant; and *that all contract and property rights are held subject to its fair exercise.* [*Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, 558, and cases cited.] And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity as well as those in the interest of the public health, morals or safety. [*Lake Shore & Mich. Southern Ry. Co.* v. *Ohio,* 173 U. S. 285, 292; *C. B. & Q. Ry. Co.* v. *Drainage Commissioners,* 200

U. S. 561, 592; *Bacon* v. *Walker,* 204 U. S. 311, 317.]'' ' (Italics ours.)

"The fixing of a rate for a public commodity, as we have here, falls under the police power of the State. From the beginning we have so ruled. This constitutional provision disrobes the contention of interveners as to private contract rights. *They are not private contract rights,* and when so viewed, there is no substance to these sundry contracts.'' (Italics ours.)

Note the words of the Supreme Court of Missouri, "These contracts are of no vitality, in so far as they affect rates,'' "The Public Service Commission, in fixing rates, cannot be clogged or obstructed by contract rates,'' "Contract prices count for naught in the fixing of rates by the Public Service Commission,'' and "They are not private contract rights, and when so viewed, there is no substance to these sundry contracts,'' and the words of this Court in the Tranbarger case, "All contract and property rights are held subject to its fair exercise,'' speaking of Sec. 5, Art. 12, Missouri Constitution.

This Court dismissed the writ of error of Washington University on the authority of Sec. 237 of the Judicial Code, as amended, and, treating the writ of error as an application for certiorari, denied it for want of a substantial Federal question, on the authority of *Skulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147.

State ex rel. Washington University v. *Public Service Commission,* 275 U. S. 489.

In view of all of the foregoing, we believe that under the construction given by the Supreme Court of Missouri

and this Court of the peculiar provisions of Sec. 5, Art. 12, of the Missouri Constitution, appellant's contract made subsequent to the adoption of said constitutional provision was subject thereto the same as if it had been written into that contract that "these rates shall be null and void and of no further force and effect when the State of Missouri exercises its police power by the establishment of rates for such service by legislative enactment or delegation thereof to some public body under the power reserved to the State of Missouri by Sec. 5 of Article 12 of the Missouri Constitution." And said rates becoming inoperative and unenforceable by virtue of the exercise of the State's prior, reserved right of the police power they ceased to be private contract rights. Therefore, when they are not private contract rights they cannot be impaired, and, not being contract rights, they certainly cease to be property rights subject to the protection of due process.

(b) The construction of par. 12, Sec. 5190, R. S. Mo. 1929, by the Supreme Court of Missouri upon the method of putting into effect a schedule of rates by the Public Service Commission is questioned in this case. The pertinent part of said paragraph and section is as follows:

> "Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly

> state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time."

This section, which applies to gas, electric and water utilities, together with cognate Sec. 5151, R. S. Mo. 1929, pertaining to railroads, street railroads and common carriers, and Sec. 5209, R. S. Mo. 1929, pertaining to telegraph and telephone utilities, are made applicable to heating utilities by Sec. 5228, R. S. Mo. 1929, originally enacted as Sec. 105a, Public Service Commission Act, L. of M. 1913, p. 557, l. c. 637.

Under said par. 12, Sec. 5190, as well as under the other cognate sections, a rate for public service may be established either by order of the Commission upon a hearing, or by the voluntary filing and publishing of the same with the Commission for a period of thirty days before its effective date, which rate so filed and published, if not suspended by the Commission within the thirty-day period, becomes the established rate.

In *State ex rel. St. Louis Gas Company* v. *Public Service Commission,* 315 Mo. 312, the Supreme Court of Missouri, Division I, in construing par. 12, Sec. 5190, said (315 Mo. 312, 317):

> "*A schedule of rates and charges filed and published* in accordance with the foregoing provisions *acquires the force and effect of law;* and as such it is

binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the Commission. Such is the construction which has been universally put upon analogous provisions of the Interstate Commerce Act (*Louisville Ry. Co.* v. *Maxwell,* 237 U. S. 94; *Gulf Ry. Co.* v. *Hefley,* 158 U. S. 98); and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies. (*State ex rel.* v. *Public Service Commission,* 264 S. W., l. c. 671-2). *If such a schedule is to be accorded the force and effect of law, it is binding not only upon the utility and the public, but upon the Public Service Commission as well.*" (Italics ours.)

In *Marty* v. *Kansas City Light & Power Company,* 303 Mo. 233, the Supreme Court of Missouri, Division No. I, in holding valid and lawful the filing of the very rates in question in this case effective August 1, 1917, said as follows (303 Mo. 233, 241, 242):

"Under the provisions of Section 10516, Revised Statutes of 1919, all the provisions of the Public Service Law, relating to utilities so far as the same shall be practically, legally or necessarily applicable to heating companies, are made applicable to heating companies. The schedule of rates filed by defendant on June 23, 1917, was filed under the provisions of Section 10497, and other cognate sections dealing with the subject of filing schedules of rates by utility companies. *The filing of the schedule was notice to the Commission. It is not contended here by respondent that the schedule filed June 23, 1917, and going into effect on August 1, 1917, was not filed in conformity with the provisions of the act.* The fact that no notice of it was given directly by appellant to the consumers is referred to here, rather by way

of explanation of the reason why the consumers did not sooner protest, than otherwise; but, the evidence tends strongly to show that the Commission did promptly mail a notice of the filing of this schedule to the city counselor of Kansas City. *That schedule became effective on August 1, 1917—became the lawful rate—until set aside by an order of the Commission, and could then be set aside only after a hearing.* * * *." (Italics ours.)

Likewise, in *State ex rel. Western Union Telegraph Company* v. *Public Service Commission,* 304 Mo. 505, the Supreme Court of Missouri, *in banc,* held that telephone rates filed and published with the Commission for thirty days, without having been suspended by the Commission, became, and until changed by the filing of a new schedule or by order of the Commission, the lawful rates and charges, binding upon both the corporation filing them and the persons who avail themselves of its service. In that case, the filing was under Sec. 5209, R. S. Mo. 1929, pertaining to telegraph and telephone utilities cognate to par. 12, Sec. 5190, and made applicable by Sec. 5228, R. S. Mo. 1929, to heating utilities.

Such is the construction of said statute by the highest court of Missouri. It is common knowledge and an accepted fact of which this Court will take judicial notice that all Public Service Commissions as well as the Interstate Commerce Commission have technical staffs of rate experts who carefully examine all filed rates by utilities as to their reasonableness before they are allowed to go into effect at the effective date, and that if there is any question as to their reasonableness a suspension order is issued and the rate suspended pending a hearing. Such Commissions pass upon rates not only by a hearing, but by examination of filed rates pending their effective date.

The reports of this Court are replete with cases where filed rates have been suspended before their effective date after examination by a Commission. Also the cases above cited show, and the Public Service Commission Law herein cited shows, that severe penalties are inflicted upon a utility for charging other than the authorized rate whether it be a filed rate or one fixed by order of the Commission, and for discrimination between consumers. In *State ex rel. Kansas City Public Service Company* v. *Latshaw,* 325 Mo. 908 (appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, certiorari denied, 282 U. S. 806), a franchise contract made many years after the effective date of the Public Service Commission Act of Missouri fixing rates was held for naught and unenforceable on the same constitutional grounds as in the cases heretofore cited in 1 (a). Therefore, contracts made after as well as before the effective date of the Public Service Commission Law are in the same category. The appellee, as can be seen from the cases herein cited, had many contracts at the time the Public Service Commission Act became effective, and it has some 125,000 contracts with consumers at the present time. It is common knowledge of which this Court will take judicial notice, that all utilities at all times had or have contracts for service with all of their consumers at the rates existing at the time the contracts are made. Therefore, if appellant's theory is correct and the Public Service Commission had to make every consumer with a contract a party to a suit and determine the reasonableness of every individual contract as to rates, whether the contracts were made before or after the effective date of the Public Service Commission Act, *the Commission would be hopelessly clogged with litigation and rates*

could never be expeditiously fixed and determined, whether lowered or raised, for the public good. The Commission simply could not function. It may be true that in a few states their laws provide and their highest courts have construed said laws that before a contract rate could be set aside the consumer party and the particular rates in the particular contract had to come before a commission for determination, but the consistent holding of the Supreme Court of Missouri pertaining to Missouri's peculiar constitutional provision and statute is to the contrary, and as heretofore set out. Clearly the filed and published rates effective August 1, 1917, were the lawful rates and the only rates that appellee could charge its steam heating consumers, including appellant, for the period they were in effect, and likewise the rates effective March 1, 1918, fixed by order of the Public Service Commission.

This Court has consistently held in construing provisions in the Interstate Commerce Act analogous to those in par. 12, Sec. 5190, R. S. Mo. 1929, that a duly filed and effective rate for railroad service is the lawful rate and the only rate that the railroad can charge until supplanted by a newly filed rate or one put into effect by the Interstate Commerce Commission by order duly made.

Louisville & Nashville Railroad Company v. *Maxwell*, 237 U. S. 94;
The Gulf, Colorado & Santa Fe Railway Company v. *Hefley*, 138 U. S. 98.

(c) This Court has consistently ruled that it is bound by the construction put upon the peculiar constitutional provisions of a state and the peculiar statutes of a state by the highest court of a state.

Georgia Railway & Power Company v. *Town of Decatur*, 262 U. S. 432, and cases therein cited (262 U. S. 432, 438).

We submit, that in this case where the Supreme Court of Missouri has construed Sec. 5 of Art. XII of the Missouri Constitution as it has (which construction has been approved by this Court) and par. 12 of Sec. 5190, R. S. Mo. 1929, and cognate statutes as it has, this Court should be bound by such construction, and that in view of all of the foregoing there is no substantial Federal question before this Court and the appeal should be dismissed.

2.

It should be noted at the outset of this point that this is a suit at law to recover (in counts 1 to 5) the difference between the rates charged by a utility under a schedule of rates filed by the utility with the Public Service Commission in strict compliance with a specific enactment of the Missouri Legislature, and the rates specified in a contract executed before the enactment of the Public Service Commission law, and to recover (in counts 6 to 11) the difference between the rates charged by a utility under a schedule of rates fixed by the Public Service Commission and the rates specified in said contract.

In both instances, it is pleaded by appellee (R. 26) and not disputed by appellant, that as soon as the two rates above mentioned became effective, appellee disregarded the contract rates and billed appellant according to the "filed" rate during the time it was in effect and the rate established by the Commission from and after its effective date.

We emphasize this point to illustrate the incorrectness of appellant's statement in its brief (p. 5) "* * * appel-

lee continued to render heating service to appellant and appellant continued to pay for same, in accordance with the contract, throughout the full term of the contract. That is to say, the contract was fully performed on both sides."

Appellant contends appellee should not recover on counts 1 to 5 of its petition for two reasons, namely:

(1) The Public Service Commission, in 5 Mo. P. S. C. Rep. 664-683, found that the schedule of rates effective August 1, 1917, was unreasonable, excessive and unlawful; and

(2) A rate which is merely "filed" even though in strict conformance with a legislative enactment, cannot serve to supersede a pre-existing contract fixing a lower rate.

(1)

In answer to the first contention, we respectfully call to the Court's attention that the Missouri Public Service Commission (8 Mo. P. S. C. Rep. 223), in what might be termed a continuation of the former hearing, held that the August 1, 1917, rates were inadequate, unjust and unreasonably low.

We feel justified in referring to the subsequent hearing as a continuation of the former because the Supreme Court of Missouri in *Marty et al.* v. *Kansas City Light & Power Co.*, 303 Mo. 233, so regarded it. In that case, the same rate as the one in the case at bar was in controversy. The facts were these: After the Commission had held the August 1, 1917, rate to be unreasonably high and had established the March 1, 1918, rate, plaintiffs therein sued Kansas City Light & Power Co. (appellee's predecessor) for the difference between what they had paid under the August 1, 1917, rate and what they claimed

they should have paid under the March 1, 1918, rate. Appellee's predecessor offered in evidence, as appellee did in the case at bar (R. 46), the findings of the Commission in case No. 1615, wherein it was held both former rates were unreasonably low and confiscatory. Recovery was denied, and it was said in 303 Mo. 233, 243, 244:

> "The finding of the Public Service Commission in case No. 1353 cannot be held to be conclusive as against the finding of the same body covering that period in case No. 1615. * * * The findings in the later case, made upon a manifestly fuller investigation, and specifically set forth, covering and including the period of the former investigation, * * * wholly overcome and destroy the general findings made in the earlier case."

Accordingly, it cannot now be reasonably urged that the August 1, 1917, rate was "conclusively established to be unreasonable, excessive and unlawful." On the contrary it was declared to be unreasonably low and confiscatory by the Supreme Court of Missouri.

> *State ex rel. Mary B. Case et al.* v. *Public Service Commission et al.,* 298 Mo. 303.

(2)

In answer to appellant's second contention we first call to the Court's attention Section 5190, R. S. Mo. 1929, under the authority of which said rate schedule effective August 1, 1917, was filed. It's applicable portions are set out in this brief at pages 18 and 19.

The appellate courts of Missouri have time and again construed paragraph 12 of section 5190 to mean that a rate properly filed with the Commission and duly published in strict conformance with said section, and not

having been suspended by the Commission, to be the only rate chargeable by the utility during the period in which the rate is in effect.

In *State ex rel. St. Louis Gas Company* v. *Public Service Commission*, 315 Mo. 312, plaintiffs sought to require defendant to extend its gas mains to reach their residences. Prior to the filing of the complaint defendant had offered to render and plaintiffs had refused to accept gas service under the terms of defendant's rules governing extensions of its mains which had been duly filed with the Commission, as a part of its rate schedule, and published, under the provisions of said section 5190. The aforesaid rate schedule containing said rules governing extensions had been merely "filed" and published precisely in the same manner as in the case at bar. The Commission ordered the defendant to comply with the demands of plaintiffs (which were in conflict with said rules) and defendant appealed. The Court, in upholding defendant's "filed" and published schedule, said at 315 Mo. 312, 317:

> "A schedule of rates and charges filed and published in accordance with the foregoing provisions acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the Commission. Such is the construction which has been universally put upon analogous provisions of the Intertstae Commerce Act (*Louisville Ry. Co.* v. *Maxwell*, 237 U. S. 94; *Gulf Ry. Co.* v. *Hefley*, 158 U. S. 98); and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies. [*State ex rel.* v. *Public Service Commission*, 264 S. W., l. c. 671-2.] If such a schedule is to be accorded the force and effect of law, it is binding

not only upon the utility, and the public, but upon the Public Service Commission as well."

In *Marty et al.* v. *Kansas City Light & Power Co.*, 303 Mo. 233, plaintiffs therein sued defendant (appellee's predecessor) to recover the amount of alleged excess charges paid for steam heat furnished between August 1, 1917, and March 1, 1918, the period in which the "filed" and published rate was in effect. The Supreme Court of Missouri denied recovery for the sole reason that the August 1, 1917, rate, having been properly filed and published under the provisions of section 5190, and other cognate sections, was lawful. It became the lawful rate, the court held, until set aside by an order of the Commission, and could then be set aside only after a hearing.

In *State ex rel. City of Kirkwood* v. *Public Service Commission et al.*, 330 Mo. 507, plaintiff sought to have annulled an order of the Missouri Public Service Commission for the reason, among others, that said order would interfere with a contract plaintiff had made with a third person. The court overruled the contention and said (330 Mo. 507, 521):

> "What contracts may have been made is not a real consideration of the Public Service Commission, under its limited authority. If a concrete case comes within its purview, the Commission is authorized to make orders (under the police power) which will best subserve the public welfare. This is irrespective of contract rights."

These decisions of the Supreme Court of Missouri lead to but one conclusion: That the filing and publishing of a schedule of rates in strict conformance with section 5190 has the effect of rendering contract rates unenforceable.

Said section does not violate the contract impairment or the due process of law provisions of the Federal Constitution and this Court has never held that it did.

Appellant places much reliance on *Wichita R. & L. Co.* v. *P. U. Comm.*, 260 U. S. 48, but the same is not in point herein. Counsel for appellant have misunderstood the nature of the court's ruling therein. The decision was based upon a Kansas statute wholly unlike Missouri's and upon constructions of said Kansas statute by Kansas courts, wholly unlike those of the Missouri courts. The Kansas statute requires a schedule of rates to be effective to have been approved by some overt act of the Commission; the Missouri statute does not. The Kansas courts have construed the statute to mean that a contract for rates with a public utility cannot be abrogated except after a finding by the Commission that they are unreasonable.

> *Kaul* v. *American Independent Teleph. Co.*, 95 Kan. 1.

The courts of Missouri have construed section 5190 to mean that when a utility files and publishes a schedule of rates in conformance therewith, all contracts for rates in conflict therewith are *ipso facto* rendered unenforceable.

So the import of the Wichita case is simply this: Where the statutes and decisions of a state preserve existing contract rates until the Public Service Commission of the state has found the contract rates to be unreasonable, the mere filing and publishing of a rate without such a finding does not, of itself, set aside the contract rates. No such problem is involved in the case at bar.

But opposing counsel say the Wichita case was not based upon the peculiar statutes of Kansas, and quote in

their brief (p. 19) three sentences from the opinion to prove it was based on general principles of constitutional government. Here again counsel for appellant have misunderstood the import of the court's language. Immediately preceding the quoted sentences this Court said it was a necessary principle that an administrative agency created by the Legislature must pursue the procedure and rules enjoined by the Legislature and show a substantial compliance therewith to give validity to its action. *That* was the conclusion referred to by this Court in the Wichita case as being in accord with "general principles of constitutional government."

The Missouri courts have construed the Missouri statute as authorizing substituted rates for existing rates without the necessity of the Commission making a finding of facts or any other order as a condition precedent to the validity thereof. Under such a construction the principles announced in the Wichita case have been accorded full respect in the procedure followed by appellee and the "procedure and rules enjoined" have been followed to the letter.

Appellant also cites *Hinkel Dry Goods Co.* v. *Wichison Ind. Gas Co.*, 64 F. (2d) 881 (C. C. A.), as supporting its proposition. Said case is no more in point than the Wichita case, because it also deals with the Kansas statute. The Circuit Court simply held that under the law of Kansas, a rate contract remains in full effect until there has been an order of the Commission finding the rates are unreasonable. But in speaking of said rate contracts the court does say (64 F. [2d] 881, 883):

> "* * * such contracts are presumed to have been made in contemplation of the paramount power of the state to regulate the rates * * *."

In *Attleboro Steam & El. Co.* v. *Narragansett El. Light Co.*, 295 F. 895, also relied upon by appellant, the District Court simply held that a local statute did not permit the substitution of a rate contract without a finding that the contract rate was unreasonable. To the same effect are the cases of *In re Searsport Water Co.*, 118 Me. 362; *Kaul* v. *Am. Tel Co.*, 95 Kan. 1; *So. Utilities Co.* v. *Palatka*, 268 U. S. 232, and *Jefferson Deposit Co.* v. *Central Ill. Light Co.*, 309 Ill. 262. None of them dealt with the Missouri statute.

In advancing such an argument, appellant obviously loses sight of the fact that the Missouri Public Service Commission did, in effect, make a finding that the contract rates involved herein were unreasonable when it held, after a full investigation in case No. 1615 (8 Mo. P. S. Rep. 223-301) that both the August 1, 1917, and the March 1, 1918, rates, both of which were higher than the contract rate, were unreasonably low and confiscatory during the periods they were in effect. And the Supreme Court of Missouri, when said case came up on appeal, ruled likewise.

> *State ex rel. Mary B. Case et al.* v. *Public Service Commission et al.*, 298 Mo. 303.

This Court has held that the Commission need not rule *in so many words* that contract rates are unreasonable and should be terminated. An order fixing new rates and determining that existing rates are unreasonably low and confiscatory is just as effective as if, after fixing the rates, there had been added therein the words "and it is hereby ordered that the contract rates shall be terminated."

> *John C. Denney et al.* v. *Pacific Telephone and Telegraph Company*, 276 U. S. 97.

We respectfully submit, therefore, that the Supreme Court of Missouri correctly stated the law of Missouri when it said in the case at bar (R. 15):

> "So, on the predetermined and undisputed facts before us we hold that the contract in controversy should be deemed nugatory from and after August 1, 1917,"

and that said ruling was in accord with general principles of constitutional government.

3.

What has been said in the preceding point was in answer to appellant's point A, and pertains, likewise, to counts one to five of appellee's petition. Herein we shall answer appellant's contentions in point B, pertaining in the main, to counts six to eleven of appellee's petition.

Risking repetition, we emphasize that appellee seeks to recover in counts six to eleven the difference between what appellant paid for steam heating service from March 1, 1918, until September 1, 1918 (based on the contract rates), and the amount appellant should have paid based upon rates fixed by the Public Service Commission after a complaint and hearing, and effective March 1, 1918. Appellant was not actually a party to the proceeding in which said rates were established by the Commission.

It was held in the state courts that the promulgation of said rates by the Commission substituted new rates into appellant's contract. Appellant contends it was not affected by the order of the Commission in case No. 1353 (1) because it was not a party to the proceeding, and (2) because the Commission made no specific order in which appellee's contract was called by name.

As to the former contention, the court will immediately

recognize that nearly all utilities have written contracts with their customers specifying rates, and that if a Public Service Commission could not raise or lower rates without first causing process to be served on every customer of the utility having a contract (in the case of appellee at the present time, some 125,000 customers have written contracts) the Commission would be so clogged and obstructed in its work that it could not function. A schedule of rates promulgated by a public service commission after a hearing supersedes *all* existing rates for the class of service covered thereby—not merely those schedules included in contracts with customers who were parties to the hearing. If that were not the law, no effect would be given the statutory provision that "* * * No corporation * * * shall charge * * * a greater or less * * * compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time * * *."

Section 5190, R. S. Mo. 1929, Vol. I, p. 1448.

The Public Service Commission Act provides that any interested party may intervene in any proceeding before the Commission.

Section 5232, R. S. Mo. 1929, Vol. I, p. 1472.

Many customers did intervene in cases 1353 and 1615. As the Supreme Court of Missouri said (R. 13):

> "From the number of cases that have come to this Court and the number of parties involved in them, it may fairly be inferred that the rate schedules in question were of more than passing local interest and notoriety, and that defendants (appellant) were aware of them from the beginning * * *."

Since appellant did not avail itself of the opportunity of being heard by the Commission in either of the proceedings, it should not now be rewarded therefor.

We respectfully urge that appellant's second proposition is also without merit. The contention is that appellant's rate was not affected because the Commission, when it established a new schedule of rates effective March 1, 1918, and declared it to be reasonable, did not specifically declare appellant's contract, providing for a lower rate, to be unreasonable.

Such a contention does violence to the fundamental theory of rate-making in Missouri, which is that there shall be no special favors, rebates, preferences, privileges or remittances to one customer in exclusion of the others.

Section 5189, R. S. Mo. 1929;
Section 5190, R. S. Mo. 1929.

This matter has been adjudicated in Missouri contrary to appellant's contention many times, and most of the cases have been approved by this Court. We will not summarize the decisions here for they have been summarized and quoted from under point 1 (pages 10-24) of this brief. In all of the Missouri cases in which the question was raised the Supreme Court of Missouri held that when the Public Service Commission makes an order establishing rates to be charged by a utility, different rates specified in an existing contract are "of no vitality" and are for naught and unenforceable.

State ex rel. City of Sedalia v. *Public Service Commission,* 275 Mo. 201 (approved by this Court in 251 U. S. 547);
City of Fulton v. *Public Service Commission,* 275 Mo. 67 (writ of error dismissed, 251 U. S. 546);

Kansas City Bolt & Nut Co. v. *Kansas City Light & Power Co.*, 275 Mo. 529 (affirmed in 248 U. S. 372);

State ex rel. Washington University v. *Public Service Commission*, 308 Mo. 328 (writ of error dismissed, 275 U. S. 489).

In addition to these Missouri cases, we again call to the Court's attention the decision in *John C. Denney et al.* v. *Pacific Telephone & Telegraph Co.*, 276 U. S. 97. In that case, appellees operated telephone plants in various cities in the State of Washington under local franchises which designated maximum permissible rates. Appellees filed schedules of proposed increased rates which were suspended. A hearing was had and the matter ultimately reached this Court. One of the contentions made before this Court was that the rates specified in the contract should continue until the Commission made an order specifically declaring *in so many words* that the contract should be terminated. This Court overruled that contention and held (276 U. S. 97, 103) that the order of the Commission was just as effective as if, after fixing the new rates, it had added thereto words specifically terminating the schedule of rates contained in the contract.

Appellant complains that there never was a finding by the Commission that the performance of the contract involved herein would have been detrimental to the public welfare and argues, therefore, that the contract was not affected. The cases cited by appellant as supporting said contention are not applicable, and such is not the law in Missouri.

Kansas City Nut & Bolt Co. v. *Kansas City Light & Power Co.*, 275 Mo. 529.

In *Arkansas Nat. Gas Co.* v. *Ark. Rd. Comm.*, 261 U. S. 379, the court was dealing with the Arkansas statute (Act 443, Acts of Arkansas 1921, p. 429) which provides that the Railroad Commission "Shall have no jurisdiction or powers to modify or impair any existing contracts for supplying gas to persons * * * and such contracts shall not be affected by this act or the act of which this is an amendment." No such limitation is imposed on the Missouri Commission. On the contrary, as hereinbefore stated, the Constitution, the statutes and the decisions of Missouri expressly provide that contract rates, when they conflict with rates fixed by the Commission, are for naught and unenforceable.

But even if appellant's statement of the law be conceded to be correct, it could not vitiate the opinion of the Missouri Supreme Court herein, because the Commission in case No. 1353 expressly found the rates "now being charged by the defendant for steam heating service * * * are unjust and unreasonable, and that said rates and prices are unreasonably high."

> *In re Kansas City* v. *Kansas City Light and Power Co. et al.*, 5 Mo. P. S. C. Rep. 664, 682 (R. 45-46).

The point raised by appellant in its brief (p. 25) that it did not own one of the buildings for which steam was furnished is a new point raised for the first time in this Court. It was neither briefed nor argued in the state courts. The contract (R. 48) says that appellant "* * * now has, owns or controls two buildings, one * * * (which stands in the name of Laura B. Minor) * * *." There is no other evidence on the subject. Appellant has never before stated in these proceedings that it did not own both buildings despite the fact that title may have

stood in the name of another (for convenience, or as a straw party, perhaps). We submit that in pressing such an argument, appellant asks this Court to rule on a pure question of fact, not related to any Federal question, and that this Court should not do so.

Lewis v. *Campau*, 3 Wall. 106.

And appellant in its answer (R. 34) admits it received service from appellee during the entire period here in controversy.

In view of the foregoing, we submit that the Supreme Court of Missouri correctly stated the law governing the rates fixed by the Commission when it said (R. 9):

> "It seems to be well settled by our decisions that the Commission has the power to fix by order reasonable * * * heating charges at rates exceeding the maximum prescribed by * * * individual contracts; that such order does not in the constitutional sense impair the obligations of such contracts. And that such rates automatically supersede all rates coming in conflict therewith."

4.

Under point C of its brief, appellant seeks to have this Court alter the construction placed upon Missouri statutes by the Supreme Court of Missouri.

The particular statutes in question are Section 5208, R. S. Mo. 1929, which provides:

> "Nothing in this act shall be construed to prevent any telegraph corporation or telephone corporation from continuing to furnish * * * service under any contract or contracts in force at the date this article takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the

> Commission, as hereinafter provided, at the rates fixed in such contract or contracts * * *,"

and Section 5228, R. S. Mo. 1929, which provides:

> "All provisions of this chapter in reference to railroad corporations, street railroad corporations, common carriers, gas corporations, electrical corporations, water corporations, telephone and telegraph corporations, in reference to * * *. All other sections, paragraphs, provisions and parts of this chapter in reference to any other corporations subject to any of the provisions of this chapter, so far as the same shall be practically, legally, or necessarily applicable to heating companies in this state, are hereby made applicable to such heating companies * * *."

Appellant reads these two sections together and interprets them to mean that "the Legislature * * * inhibited the abrogation of the contract in question" (Appellant's Brief, p. 10).

It is respectfully submitted the Missouri Legislature did no such thing. The Supreme Court of Missouri has heretofore held that the Commission has the power to fix reasonable telephone, light and heating charges at rates exceeding the maximum prescribed by ordinance, franchise or individual contracts and that such rates automatically supersede all rates which come into conflict therewith.

> *State ex rel. Sedalia* v. *Public Service Commission,* 275 Mo. 201;
> *City of Fulton* v. *Public Service Commission,* 275 Mo. 67;
> *Kansas City Bolt and Nut Co.* v. *Kansas City Light & Power Co.,* 275 Mo. 529;
> *State ex rel. Washington University* v. *Public Service Commission,* 308 Mo. 328.

Note that section 5228 provides that only those sections of chapter 33 as are "practically, legally and necessarily" applicable to heating companies are thereby made applicable to such heating companies. We respectfully submit that section 5208, which specifically restricts its application to telegraph and telephone corporations, is not "practically, legally and necessarily" applicable to heating companies. It is to be noted that the Legisature did not make provisions similar to those contained in section 5208 in its regulation of electric companies, water companies, gas companies, railroad companies, street railroad companies, or common carriers. It singled out only telegraph and telephone companies. Just why section 5228 is classified as a part of Article V of the Public Service Commission law in reference to telegraph and telephone corporations, rather than as a part of article IV, in reference to water, gas and electric companies, or why it was not given a separate classification, is not disclosed by a careful study of the statute. There is not as much logical connection between section 5228 and the remainder of article V as there is between section 5228 and article IV. Steam heating is more naturally allied with the generation of electricity for light and power than with the operations of telegraph and telephone companies. Except for the accident of such physical classification with telegraph and telephone corporations, there is no more reason for excepting any part of the contracts of heating companies from the regulatory power of the Commission than there is for applying such exceptions to the contracts of gas, electric and water corporations and holding that they are not subject to the regulatory power of the Commission. In other words, should the rate fixing provisions relating to telegraph and telephone corporations be regarded as "practically, legally

or necessarily'' applicable to heating companies? We think not.

We feel a much more intelligent meaning was placed upon sections 5228 and 5208 by the Supreme Court of Missouri. In effect, the Supreme Court of Missouri held (R. 11) that, even conceding paragraph 4 of section 5208 to be applicable to heating companies, said statute does not exempt such contracts from the exercise of the police power of the state to promote the general welfare by regulating rates of a public utility so as to raise previously existing contract rates. To have held otherwise would have nullified the plain provisions of paragraph 3 of Section 5189, R. S. Mo. 1929, wherein it is provided that no utility may receive a greater or less compensation for its service than it charges or receives from any other person under the same circumstances, and the plain provisions of paragraph 12 of Section 5190, R. S. Mo. 1929, wherein it is provided that no utility shall receive a greater or less compensation for its service than the rates applicable to such service as specified in its schedule filed and in effect at the time.

In other words, a telegraph or telephone company, under section 5208, was allowed the *option* of continuing a rate contract in effect if it did not violate the provisions of said sections 5189 and 5190. Whatever else may be said, it must be conceded that the highest court in Missouri has construed section 5208 in the light of the provisions of the Constitution of Missouri (R. 11) and has interpreted said statute to mean that rates specified in contracts are not thereby preserved when the Public Service Commission approves a new schedule of rates. Such being the case, the question becomes one of pure local law, and this Court has consistently held it will not

review a decision of a state court attributing a particular meaning to a statute of that state.

Supreme Lodge etc. v. *Meyer,* 265 U. S. 30.

CONCLUSION.

It is respectfully submitted in conclusion that since the highest court of Missouri has consistently held that the enactment of the Public Service Commission Law and the establishment of rates thereunder by the Commission is a proper exercise of the police power reserved under the Missouri Constitution, there has been no violation of the due process clause of the Federal Constitution, the contract rates herein involved having been superseded in the statutory manner; and since the highest court of Missouri has held that all contracts made with public utilities have, in effect, written into them "subject to the exercise of the state's police power by the creation of a Public Service Commission and the establishment of higher rates by said Commission" appellant had no such contract as is afforded protection under the Federal Constitution.

Respectfully submitted,

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